UNITED NATIONS

General Assembly

FORTY-EIGHTH SESSION

Official Records

SIXTH COMMITTEE
16th meeting
held on
Thursday, 21 October 1993
at 10 a.m.
New York

SUMMARY RECORD OF THE 16th MEETING

Chairman: Mrs. FLORES (Uruguay)

CONTENTS

AGENDA ITEM 152: QUESTION OF RESPONSIBILITY FOR ATTACKS ON UNITED NATIONS AND ASSOCIATED PERSONNEL AND MEASURES TO ENSURE THAT THOSE RESPONSIBLE FOR SUCH ATTACKS ARE BROUGHT TO JUSTICE (continued)

ORGANIZATION OF WORK

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of the publication* to the Chief of the Official Records Editing Section, room DC2-794, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

Distr. GENERAL
A/C.6/48/SR.16
24 November 1993
ENGLISH
ORIGINAL: SPANISH

The meeting was called to order at 10.30 a.m.

AGENDA ITEM 152: QUESTION OF RESPONSIBILITY FOR ATTACKS ON UNITED NATIONS AND ASSOCIATED PERSONNEL AND MEASURES TO ENSURE THAT THOSE RESPONSIBLE FOR SUCH ATTACKS ARE BROUGHT TO JUSTICE (continued) (A/48/144; A/C.6/48/L.2 and L.3)

1. Mr. KHAN (Pakistan) said that the United Nations peace-keeping activities had, over the past few years, grown rapidly in number, nature and size. United Nations peace-keepers were increasingly being deployed in hostile conditions and conflict situations, which exposed them to great physical risk. In his report on the security of United Nations operations (A/48/349), the Secretary-General indicated that during the current year, the casualty rate for United Nations peace-keeping personnel had been approximately one every two weeks, which was twice the rate in 1992. The sharp increase in attacks against United Nations personnel underscored the need for the international community to deal effectively and urgently with that serious problem.

2. As a troop-contributing country whose soldiers had laid down their lives while on peace-keeping duty, Pakistan condemned the violence directed against United Nations personnel.

3. His delegation was pleased to note the Secretary-General's intention to introduce measures to ensure that security matters would become an integral part of planning for new operations and that both short-term and long-term strategies need to be considered to enhance the safety of personnel involved in peace-keeping and other operations. Such measures should relate to both physical safety as well as legal protection.

4. The Committee was uniquely qualified to make a contribution with regard to legal protection. Pakistan agreed that attacks on United Nations peace-keeping personnel must be considered criminal acts and that those who committed or ordered such acts must be prosecuted and punished. Parties to a conflict who were unwilling to discharge their responsibilities in that regard should be held responsible under international law.

5. His delegation welcomed the proposals made by New Zealand and Ukraine (A/C.6/48/L.2 and L.3). Although the scope and nature of the two proposals were different, they shared the same purpose and merited serious consideration by the Committee. His delegation was prepared to participate in discussions on the two draft resolutions and, in that regard, supported the establishment of a working group of the Sixth Committee as proposed by New Zealand.

6. Mr. JAAFAR (Malaysia) said that his delegation welcomed the proposal by New Zealand for a draft convention on responsibility for attacks on United Nations personnel (A/C.6/48/L.2) because it felt that that was a timely initiative, given the United Nations increasing role in peace-keeping and the number of peace-keeping operations currently being undertaken in many parts of the world.

7. The dangers that those troops were exposed to were obvious and had been well publicized. Many of the troops had lost their lives carrying out their tasks and some had been the deliberate targets of groups that were hostile to United Nations peace-keeping efforts. In his report "An Agenda for Peace", the

(Mr. Jaafar, Malaysia)

Secretary-General estimated that 528,000 military, police and civilian personnel had served under the flag of the United Nations until January 1992. Over 800 of them from 43 countries had died in the service of the Organization. As everyone knew, many more had died or been seriously injured between January 1992 and October 1993. That was an unacceptable state of affairs and the international community should not allow it to continue unchecked. The persons responsible for those criminal acts must be made to answer for their crimes.

8. The proposed convention, which, of course, would only complement other efforts undertaken, would fill a gap in international law. Existing international conventions such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the International Convention against the Taking of Hostages or even the Geneva Conventions did not specifically cover United Nations peace-keeping troops.

9. As a troop-contributing country which was currently involved in a number of United Nations peace-keeping and field missions, Malaysia considered that initiative particularly relevant and looked forward to working closely with all delegations to promote the protection and safety of all United Nations personnel engaged in such activities.

10. Some delegations had expressed the opinion that the elaboration of a multilateral convention would not lead to speedy results. Although he agreed with that observation, he felt that, if the United Nations role in peace-keeping and peace enforcement was to be a permanent feature of its operations, the instrument would be necessary not only for the protection of personnel but also to deter those seeking to challenge the will of the international community through criminal acts.

11. With regard to the specific provisions of the draft text submitted by New Zealand (A/C.6/48/L.2), Malaysia agreed that the scope of the draft convention should be extended to cover all United Nations personnel. He suggested, however, that agreements between the humanitarian organizations or agencies referred to in article 2 (c) of the draft should have the prior approval of the Security Council. Malaysia also welcomed the provisions concerning extradition of alleged offenders and the granting of jurisdiction to States against whose nationals crimes were committed. That was how he interpreted the relevant provision in article 6, paragraph 1 (c) of the draft, which should be worded more clearly and unambiguously. That important provision, however, might not be applicable in situations where there was a total collapse of civil authority and the judicial machinery, as in the case of Somalia. An appropriate procedure might have to be devised to deal with such situation.

12. His delegation supported the proposal to establish a working group to consider the draft convention in detail. The working group could consider the proposals by New Zealand and Ukraine together and also explore the possibility of combining the two texts, if that was agreeable to their sponsors.

13. Mr. AREVALO (Chile) said that, as a country that had participated in various peace-keeping operations, Chile attached great importance to item 152, which related to a timely subject requiring urgent attention.

14. Owing to the increase in such operations, an ever larger number of people had found themselves in complex, difficult situations that endangered their safety. The Organization, under whose mandate they operated, should provide them with maximum protection. As the Secretary-General's report on the security of United Nations operations (A/48/349) indicated, the number of casualties from assaults against United Nations personnel had increased to an extent unacceptable to the international community.

15. His delegation, convinced of the need for a convention the purpose of which was to bring to justice persons responsible for those illegal actions, applauded the proposal formulated by New Zealand (A/C.6/48/L.2), which provided an important basis for a full study of the question. It shared the concern expressed by other delegations with regard to a possible delay in the entry into force of the resulting legal instrument (which would essentially codify existing laws), because such delay could to some extent vitiate those precedents and could transmit a misleading signal as to the resolve and determination of the international community on that issue. Chile none the less believed that that situation was avoidable.

16. Given the peace-keeping role of United Nations and associated personnel, and the fact that they were permitted to wield their arms only in self-defence, attacks on them were serious crimes. Furthermore, those attacks not only harmed their immediate victims, but also indirectly harmed the Organization. No alleged offender should escape prosecution, and States should incorporate into their national legislation the criminal offence in question. The principle of universality of jurisdiction and the regime of extradition or prosecution were other essential elements that should be included in the convention.

17. Chile believed that the proposal of Ukraine (A/C.6/48/L.3) contained ideas that would prove interesting and useful in the Committee's eventual discussions on measures and procedures.

18. Mr. ROSENSTOCK (United States of America) said that his delegation agreed with the general view on the importance of item 152; there was indeed no more urgent item. The number of casualties among peace-keepers and people engaged in humanitarian assistance justified that conclusion.

19. The Secretary-General's report on the security of United Nations operations (A/48/349) precisely defined the problem. That report contained both short- and long-term recommendations. Progress had been made on the former. The Security Council had stressed that host countries must adopt appropriate measures to ensure the safety of all personnel engaged in operations authorized by it, and that status-of-forces agreements should come into force as soon as possible after the start of the corresponding operation.

20. The draft conventions submitted by New Zealand and Ukraine were welcome contributions that merited careful consideration by all States. In the view of the United States, a convention whose purpose was to enhance the protection of

(Mr. Rosenstock, United States)

personnel who participated in peace-keeping and related operations would be of considerable assistance to the Organization in its operations for the maintenance of international peace and security.

21. The convention proposed by New Zealand would apply to all operations established pursuant to a mandate approved by the Security Council, whether they were traditional observer missions or the type of operation recently undertaken in the conflict between Iraq and Kuwait and in Somalia.

22. The New Zealand proposal raised several questions. The relationship between that proposal and the existing laws of war, as well as the implications for persons engaged in hostilities associated with peace-keeping operations authorized by the Security Council, would, for example, have to be examined. Under the draft convention, activities which would not be considered illegal under the laws of war would be criminalized in cases where the United Nations was one of the combatants. That might be appropriate, particularly considering the fact that those operations were authorized by the organized international community. And yet, care must be taken to avoid unintentionally creating a juridical system that would undermine the protection of combatants during armed conflicts. Would, for example, those engaged in combat against United Nations forces consequently lose the incentive to comply with the rules of armed conflict or to exchange prisoners, as had occurred at the end of the Korean and Gulf wars?

23. Other points deserving of careful consideration were the following: the nature of the crimes to be included and their relationship to certain principles of international law and to certain aspects of international humanitarian law; the scope of jurisdiction and the interest of States affected by the illegal action; categories of United Nations operations and categories of persons covered by the convention; and the role of the Security Council or the United Nations in the implementation of such a convention.

24. The proposal of Ukraine, although broader and in some ways more ambitious, was not incompatible with that of New Zealand. In large measure, the subject matter it covered might be dealt with in the form of a declaration or resolution. Indeed, the Security Council had already moved in that direction. In that regard, it would be necessary to ponder the advisability of using a multilateral status-of-forces agreement rather than model agreements, and insisting that those agreements should be concluded with host countries at the earliest possible time. It might therefore be useful to hear the views of Secretariat officials who had participated in the negotiation and implementation of such agreements. The most appropriate forum for the consideration of some of the issues raised by the Ukrainian proposal might be the Special Committee on Peace-keeping Operations.

25. The United States endorsed the idea of immediately creating a working group of the Committee to begin the task of considering the New Zealand draft convention. That draft naturally did not cover all aspects of the problem, some of which would have to be considered by the Security Council, the Special Committee on Peace-keeping Operations, and any other body the Committee might decide to establish.

26. Mrs. DASCALOPOULOU-LIVADA (Greece) welcomed the timely inclusion of agenda item 152 on the initiative of New Zealand. The problem of attacks on United Nations personnel had worsened because of the Organization's increasing use of its peace-keeping and peacemaking potential. The situation, which was a recurrent theme in the daily news, required urgent attention. Greece was very sensitive to the problem, whose tragic consequences had once again smitten the national conscience owing to the killing of a Greek sergeant a few days previously in Somalia.

27. The first question was to decide on a suitable approach. The conventional approach had been criticized as slow and potentially risky in so far as the support required for the entry into force of the proposed instrument might not be forthcoming, a situation which could undermine existing international law on the subject. Nor did the alternative approach, namely of compiling or codifying the existing body of international rules of law, seem entirely satisfactory, since the result might not be sufficiently coherent, clear or comprehensive. Greece considered that the two criteria were not mutually exclusive, nor did they exclude the other practical measures which should be taken promptly, as proposed by the Secretary-General.

28. The principal merit of the draft convention proposed by New Zealand (A/C.6/48/L.2) was that it characterized attacks on United Nations personnel as an international crime, taking other United Nations conventions as precedents, in particular those relating to terrorism. It also preserved the basic principle of "aut dedere aut judicare".

29. Taking a different conceptual approach, the Ukrainian proposal (A/C.6/48/L.3) encompassed the whole range of questions relating to the status and safety of United Nations personnel. Parts I and II of the draft were particularly interesting, although the relationship between article 5, paragraph 3 (a), and article 7, paragraph 2, required clarification. In part III, the assertion in article 10 to the effect that acts of violence against United Nations personnel would "entail international responsibility" should be further qualified. In that respect, the New Zealand draft was more specific and therefore preferable. In any case, Greece believed that the two drafts should be examined together and that a working group should be set up for that purpose.

30. Mr. BASNET (Nepal) said that his delegation had a direct interest in the debate on the current agenda item, since there had been several Nepalese victims among the casualties as a result of the increasingly frequent attacks on staff engaged in United Nations peace-keeping operations. Recent experience had shown that the methods traditionally used to assign the responsibility for such attacks were not always effective in the type of situations currently requiring United Nations intervention and, as had been seen in Cambodia and Angola, the options available to the international community when confronted with such events were limited.

31. Aware of the situation and the need for the persons responsible for such attacks to be punished, Nepal supported the proposal to draft an international convention on responsibility for attacks on United Nations personnel. Likewise, it endorsed the proposal for the establishment of a working group, which when

(Mr. Basnet, Nepal)

drafting the text should bear in mind the need to avoid any overlapping with the obligations under existing instruments and to protect all staff employed by the Organization. Lastly, Nepal endorsed the proposal to consolidate the texts of the New Zealand draft convention and the Ukrainian draft convention on the status and safety of United Nations personnel, thereby facilitating the task of bringing to justice those responsible for such attacks.

32. Mrs. VALDES (Cuba) said that the subject under discussion was extremely delicate, since it concerned the protection of human life. Her delegation had noted with interst the proposals contained in documents A/C.6/48/L.2 and L.3 but had observed that, although the proposals were similar in intent, they differed in their contents and approach. Moreover, a number of clear trends had emerged in the course of the debate. For example, some delegations were in favour of a convention, while others tended towards a declaration. One delegation had proposed the drafting of a declaration forthwith and the preparation of a binding legal instrument at some future time. Furthermore, while some delegations had indicated that they were in favour of protecting only United Nations staff, others had suggested that the protection should be extended to staff from organizations which carried out similar activities, although not under the auspices of the Organization.

33. The proposals before the Committee raised a number of questions and in certain respects were incomplete. For example, her delegation had some doubts regarding the role assigned to the Security Council in the Ukrainian draft convention and regarding the reference it made to Chapter VII of the Charter, which concerned a very specific situation not necessarily connected with the violation of a convention. Moreover, due account had not been taken of the principle of prior agreement by the parties to a conflict required for carrying out peace-keeping operations, yet the non-observance of that principle might have far-reaching and tragic consequences. Nor had account been taken of the need to decide what would happen when civilian casualties were suffered among the local population as a result of such operations, an aspect which could not be overlooked without sacrificing justice and impartiality.

34. In view of those and other discrepancies and problems, before it started the codification process, the Committee should endeavour to reach agreement on the approach that should be followed in order to achieve the desired objective. Consequently, at the present juncture it would be more appropriate for the General Assembly to adopt a resolution requesting the Secretary-General to elicit the views of Member States on the matter and for the Committee to postpone the establishment of a working group until the following session. The group would then have a clear and well-defined mandate, which would facilitate its work.

35. If, however, it was decided to set up the proposed group at the current session, her delegation would prefer it to be open-ended, since that would allow for the adoption of a document which would be generally acceptable, thereby guaranteeing its swift and effective implementation.

36. Mr. POLITI (Italy) said that the two draft conventions before the Committee were intended to enhance the safety of staff engaged in some of the peace-keeping operations, where recent developments had increased the risks involved to such an extent that one staff member was dying every two weeks, as indicated in document A/48/349.

37. With more than 3,000 troops deployed in a total of eight peace-keeping missions, Italy welcomed the decision to take up the matter. It appreciated the New Zealand proposal, which highlighted various important aspects of the problem, including that of individual responsibility, and was a good starting-point for future work, particularly in view of the need to remedy the shortcomings of international law in that area. Naturally, such an exercise should not prevent those concerned from having recourse to instruments such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons and the International Convention against the Taking of Hostages. None the less, it had to be admitted that in many cases those instruments could be ineffective, as in the case of peace-keeping missions to countries where the Government was not in a position to protect United Nations personnel or to ensure that those responsible for attacks on them were punished.

38. Lastly, his country supported the proposal to establish a working group to consider the matter. In his opinion, it should concentrate on three questions, namely what personnel were entitled to protection under the draft convention, the definition of the crimes the convention would cover and the relationship between it and a possible international criminal court.

39. Mr. HAHM (Republic of Korea) said that his country attached great importance to the role of the United Nations in the maintenance of international peace and security. For that reason it supported the strengthening and expansion of peace-keeping operations, to which it contributed troops. It therefore viewed with deep concern the newly emerging threats to the civilian and military personnel in those operations, since such threats could seriously undermine the Organization's capacity to carry out its functions. In that regard he recalled that, as the Minister of Foreign Affairs of his country had stated in his statement to the General Assembly, effective arrangements needed to be worked out to enhance the safety of those involved in United Nations peace-keeping operations.

40. His country therefore supported the proposals in the Secretary-General's report (A/48/349) and believed that the time had come for the Sixth Committee to consider the legal aspects of the problem, which was important. He consequently supported the proposal that a working group should be established immediately to examine the draft conventions submitted by the delegations of New Zealand and Ukraine, which in his view represented a good starting-point for tackling the problem.

41. Mr. ORDZHONIKIDZE (Russian Federation) said that experience had shown that peace-keeping operations were among the most effective ways of resolving ethnic, religious, territorial and other conflicts, such as those which had broken out since the end of the cold war. That explained the constant increase in the personnel assigned to such operations, currently amounting to over 75,000 people.

(Mr. Ordzhonikidze, Russian Federation)

42. That increase had unfortunately been accompanied by a significant rise in the number of people who had lost their lives in carrying out peace-keeping functions. Between 1 January and 12 October 1993 alone, United Nations forces had suffered 170 casualties. In such circumstances the need to ensure the safety of United Nations personnel had become an urgent problem. His delegation therefore welcomed the timely initiative of the delegations of New Zealand and Ukraine in presenting their two draft conventions on the question of responsibility for attacks on United Nations personnel and shared the opinion expressed in document A/48/349 that any future instrument should be elaborated in stages. The first step in that direction should be to prepare a declaration of principles which contained general guidelines on measures to be adopted to ensure the safety of United Nations personnel and established the legal basis for a set of possible rules imposing responsibility on States and on individuals and legal entities.

43. His delegation supported the proposal that a working group should be established as soon as possible to examine the draft conventions submitted by New Zealand and Ukraine. Although the drafts represented a good starting-point for the elaboration of a standard instrument in that field, however, they did not altogether meet his country's concerns in that regard and did not touch on certain important aspects of the problem, which meant that further comment was needed.

44. First, careful consideration should be given to the possibility of having the future instrument ensure the safety of not only the military, police and civilian members of the peace-keeping operations, but also the personnel of non-governmental organizations and humanitarian aid programmes. Secondly, since in practice it was very difficult to make a distinction between traditional peace-keeping operations and those which came under Chapter VII of the Charter, his country believed that when the time came the relevant safety measures should not be determined on the basis of that distinction, but on the way the situation developed in areas of conflict.

45. Lastly, in view of the nature of the current conflicts, it would be appropriate to consider the possibility of elaborating an instrument which would be binding not only on States, but also on all parties to a conflict, and of incorporating standards of conduct to be observed by peace-keeping personnel. Particular consideration should be given to the possibility of regulating the use of firearms by such personnel, especially in cases of self-defence and persistent violation of Security Council resolutions or non-compliance with them by one or more parties to a conflict.

46. Mr. MONTES DE OCA (Mexico) said that two precedents in support of producing a draft convention had been cited, namely the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and the International Convention against the Taking of Hostages, to both of which Mexico was a party. The work of the Sixth Committee was clear in both instruments and his country considered it appropriate that an open-ended working group should be established which would consider all the features of the drafts submitted by New Zealand and Ukraine.

47. Mr. OBEIDAT (Jordan) said that the question under consideration had been included in the agenda of the Sixth Committee at an appropriate time, given the increasing number of peace-keeping operations undertaken by the United Nations, the greater role it was playing in that sphere and the rise in the number of attacks against its personnel. The increase in such attacks imposed the need for a general framework to protect United Nations personnel from attack and to bring those responsible to justice, especially when there was no established authority or when those in authority were incapable of imposing respect for order. In those circumstances there was a clear need for a legal instrument which dealt with the matter appropriately.

48. The drafts submitted by New Zealand and Ukraine both supported the notion that such an instrument could take the form of an international convention. Questions did arise, however, regarding its nature, its relationship with other international instruments such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the International Convention against the Taking of Hostages, the agreements on the status of United Nations peace-keeping forces and the Geneva Conventions and their additional Protocols, and regarding the nature of such an instrument in relation to those not party to it. In his country's opinion, the convention would not be binding on them. It would also have to be determined whether the convention would apply to all United Nations operations and whom it would protect. Jordan believed that it should apply primarily to officials of the United Nations and the specialized agencies, in accordance with agreements concluded with the host country. Secondly, it should also apply to aid personnel and members of humanitarian non-governmental organizations, but only if the relevant agreement with the United Nations had been signed. Lastly, it should be noted that the correct application of the convention and the arrest, investigation and prosecution of those responsible for such attacks raised other specific questions, especially in cases where no authorities existed or where existing authorities were incapable of maintaining order.

49. The two drafts represented a good basis for consideration of the matter. The protection of peace-keepers was an obligation incumbent on all countries which was very insignificant compared with the personal sacrifice of the individuals concerned. His country declared its confidence in them and in the United Nations commitment to peace-keeping. It adhered to the agreements that had been concluded on the matter and offered its fullest cooperation within the framework of a working group.

50. Mr. MADEJ (Poland) said that, bearing in mind the alarming number of casualties among both military and civilian United Nations peace-keeping personnel, and as a State which contributed troops to those operations, Poland welcomed the draft conventions introduced by New Zealand and Ukraine and considered that the two proposals constituted a clear basis for further work in the Sixth Committee on all legal aspects of the problem.

51. Enhancing the security of the United Nations forces and personnel involved in peace-keeping and other operations was a matter of urgency which required immediate action. The provisions of international law relating to the protection of such personnel should be no less effective than those relating to participants in armed conflicts. Countries in which United Nations peace-keeping operations were deployed were obliged to take all necessary measures to

(Mr. Madej, Poland)

ensure the safety of the personnel involved in those operations, but sometimes were not in a position to do so. Such situations required that other possible alternatives be considered, including action by the Security Council.

52. Poland intended to participate actively in all efforts aimed at enhancing the security of United Nations operations and their personnel and elaborating a universally binding international instrument in that field. To that end, it supported the proposal for the establishment of a working group on the item.

53. Mr. CHATURVEDI (India) said that, in view of the increase in United Nations peace-keeping activities around the world and the growing casualties among the participants in those operations, the issue of the safety of peace-keeping personnel was of particular interest to India, which had contributed troops to peace-keeping operations in various countries.

54. In his report (A/48/349), the Secretary-General described the existing arrangements for the protection of United Nations forces assigned to serve in a peace-keeping operation and referred to the model status-of-forces agreement governing personnel assigned to such operations. That model agreement contained all the principles of international law which were applicable to United Nations peace-keeping operations. For its part, the Security Council had adopted by consensus resolution 868 (1993), which contained several useful recommendations, including the recommendation that an agreement on the status of the operation in the host country should be negotiated expeditiously and should come into force as near as possible to the outset of the operation. India agreed with those recommendations.

55. With regard to the draft conventions proposed by the delegations of New Zealand and Ukraine, India was of the view that, while the objective of the two drafts was the same, they differed in approach. The draft of New Zealand was mainly concerned with the problem of prosecution and punishment of persons responsible for attacks against United Nations and associated personnel, while the Ukrainian proposal was for a convention in a broader context, since the question of the responsibility of offenders included other difficult and controversial issues, such as the questions of individual responsibility for attacks on United Nations personnel, establishment of jurisdiction and extradition of alleged offenders. Another important issue which needed consideration was the precise scope of the draft convention, namely, whether it should be confined only to the personnel engaged in United Nations peace-keeping operations or should also include every other individual who was somehow connected with the operations. In his delegation's view, it would be better if the first solution were chosen initially, since that would lead to the early conclusion of the convention and would facilitate its subsequent ratification by States.

56. Moreover, the Committee should not overlook the principle of State sovereignty and the question of the privileges and immunities of the personnel concerned. United Nations peace-keeping operations should therefore be established only with the consent of the State concerned. Cases such as that of Somalia were exceptions and must remain so. United Nations and associated

(Mr. Chaturvedi, India)

personnel who were deployed in a country should respect the laws and regulations of the host country. Similarly, both the parties to a conflict and United Nations and associated personnel should respect the rules of international humanitarian law.

57. India, needless to say, joined those delegations which had spoken on the item in condemning the attacks on United Nations and associated personnel deployed in peace-keeping operations and supported the view that those responsible should be adequately punished, generally in accordance with the domestic law of the State concerned. Where that was not possible, the State concerned must cooperate with other States in the arrest, prosecution and extradition of the individuals concerned.

58. In conclusion, and in view of the complexity of the matter, India supported the idea of establishing a working group to deal adequately with the legal and political considerations involved and to draft a convention on the subject.

59. Mr. MWANGI (Kenya) said that recent tragic events in Somalia and elsewhere had brought into focus the question of responsibility for attacks on United Nations and associated peace-keeping personnel, a matter which had already been touched upon in a report of the Secretary-General (A/48/349). That report had underscored the inadequacies of existing arrangements for the protection of United Nations personnel, the need to give such personnel maximum protection and the imperative necessity to develop realistic and effective measures to deal with the dangers that faced United Nations personnel. In that regard, the inclusion of the item in the agenda of the General Assembly and the draft conventions introduced by New Zealand and Ukraine were very timely. Although different in their approach, those proposals provided a sound basis for the Committee's work.

60. The proposal of New Zealand placed the primary responsibility for the safety of United Nations personnel on the States parties to the instrument. However, in addition to every Government's normal responsibility to maintain order and protect persons and property within their jurisdiction, the proposal extended jurisdiction over trial and punishment for alleged crimes committed against United Nations personnel beyond the territory of the State in whose territory the crime had been committed. Such situations were already covered by the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. The problem of responsibility for attacks arose where government authority was not adequately exercised or where it was lacking altogether. Being able to ascertain and place individual responsibility for crimes committed against United Nations personnel was crucial for determining which measures should be adopted later, particularly in the extremely hazardous conditions of new United Nations operations.

61. An important element of the arrangements for the protection of United Nations peace-keeping forces and personnel was the model status-of-forces agreement between the United Nations and host countries, produced by the Secretariat (A/45/594, annex), which defined the status, privileges and immunities of United Nations forces, and which embodied the relevant principles

(Mr. Mwangi, Kenya)

of international law and practices applicable to United Nations peace-keeping operations. It was relevant to note that under such agreements, the Government of a country hosting a peace-keeping operation undertook to respect the exclusively international nature of the operation and to ensure the prosecution of persons subject to its criminal jurisdiction who were accused of acts against United Nations peace-keeping personnel. Such a measure strengthened the protection of United Nations personnel and reinforced the status and authority of the Organization. In conclusion, Kenya considered that the scope of the draft instrument should be extended to cover persons deployed by any United Nations organization in the course of a peace-keeping operation, and also personnel of any humanitarian organization or agency acting in the context of a United Nations operation pursuant to an agreement with the Secretary-General.

62. Mr. MARTENS (Germany) said that United Nations peace-keeping activities had increased and broadened dramatically in recent years. The death toll of the personnel involved had also increased: in 1993 more than 170 military personnel, including a German national, had been killed in peace-keeping operations.

63. Since in a growing number of cases neither the host country nor the parties to the conflict had the ability or the will to protect United Nations personnel, there was a manifest need to take all the necessary political and legal steps to ensure the safety of persons acting in the cause of peace on behalf of the international community.

64. The German delegation therefore supported the position taken by the Secretary-General in his report (A/48/349) advocating action by the Security Council, the General Assembly and the Secretary-General himself. The proposal for a convention providing for personal criminal responsibility for attacks against United Nations personnel was an important initiative, and Germany supported the New Zealand proposal that the drafting models should be the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and the 1979 International Convention against the Taking of Hostages.

65. The New Zealand draft convention confirmed the obligation of all States to prevent attacks against United Nations personnel in their territory but it also established the personal responsibility of the perpetrators by making such acts crimes punishable under the national laws of States parties. That was especially important when the United Nations was operating in areas of the world where there was no effective authority to guarantee that the perpetrators were actually punished. The draft convention would fill a legal vacuum, and Germany agreed that a working group should be set up to consider its text.

66. Germany attached great importance to certain questions such as the definition contained in article 5 of the New Zealand draft text (A/C.6/48/L.2) entitled "Crimes against United Nations personnel", and to the list of protected persons contained in article 2. The effective application of an international legal instrument to combat attacks on United Nations personnel depended to a large extent on the careful drafting and fine-tuning of those articles. The same held true with regard to the prosecution of perpetrators. In that

(Mr. Martens, Germany)

connection it was essential to determine who was to undertake the prosecution once the conflict had come to an end or when the United Nations peace-keeping forces were engaged in areas ravaged by civil war. The soldiers in the United Nations peace-keeping operations who had been awarded the Nobel Peace Prize in 1988 deserved effective measures to ensure their safety.

ORGANIZATION OF WORK

67. The CHAIRMAN declared the consideration of item 152 concluded. During the debate many speakers had referred to two aspects of the item, i.e. its importance and the need to entrust to a working group of the Committee the task of laying the foundations for future work on the item. If there was no objection, she would take it that the Committee agreed to establish a working group, which would be able to hold only a limited number of meetings during the current session, subject to the availability of conference services.

68. Mr. BISSEMBER (Guyana) said that he was not against the idea of setting up a working group but some points had to be made clear: for example, whether the working group would consider in parallel the draft conventions proposed by New Zealand and by Ukraine or whether the two texts would be merged. As for the scheduling of meetings, it might be better for the working group to meet between sessions.

69. The CHAIRMAN said that it would be for the working group itself to decide on its procedures. In any event, it would have very little time to meet.

70. Mr. ORDZHONIKIDZE (Russian Federation) asked how the chairmanship of the group would be decided and whether, in view of the time pressure, consultations might be held on the point.

71. The CHAIRMAN said that the first thing was to decide to establish the working group; the question of its chairmanship could be taken up immediately afterwards. If there were no more speakers, she would take it that the Committee wished to establish the working group.

72. It was so decided.

73. Mr. NEUHAUS (Australia) said that consultations had been held with delegations and, in accordance with their wishes, he proposed that the working group should be chaired by the representative of Canada, Mr. Kirsch. Mr. Kirsch was extremely well qualified for the job and would ensure the success of the working group's deliberations.

74. Mr. KIRSCH (Canada) thanked the Committee for the confidence placed in him and the representative of Australia for his kind words. He would do everything he could to ensure that the work was brought to a happy conclusion. As for the organization of work, time was extremely limited and he would have to explore the possibility of holding meetings additional to the ones planned. In any event, the important thing was to decide what could be done in such a short time; above all, what type of instrument was to be adopted. Then, some delegations wanted to make more detailed comments on the two draft texts. And

(Mr. Kirsch, Canada)

lastly, but equally important, the number of meetings available was clearly too few for the drafting of a legal instrument, and a decision must therefore be taken as to what would be done after the end of the session.

75. Mr. MOHAMMED (Nigeria) said that the first meeting planned by the working group coincided with another meeting and that a way would have to be found to solve that problem.

76. Mr. ROSENSTOCK (United States of America) said that the schedule could no doubt be adjusted so that the meetings could take place consecutively instead of simultaneously and he suggested a way of achieving that.

77. Mr. TICHY (Austria) thanked the United States delegation for its suggestion.

78. The CHAIRMAN said that interested delegations should decide among themselves the scheduling of the meetings of the working group. The Secretariat would try to meet the servicing needs.

The meeting rose at 12.25 p.m.

UNITED NATIONS

General Assembly

FORTY-EIGHTH SESSION

Official Records

SIXTH COMMITTEE
17th meeting
held on
Monday, 25 October 1993
at 10 a.m.
New York

SUMMARY RECORD OF THE 17th MEETING

Chairman: Mrs. FLORES (Uruguay)

CONTENTS

AGENDA ITEM 143: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of the publication* to the Chief of the Official Records Editing Section, room DC2-794, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

Distr. GENERAL
A/C.6/48/SR.17
26 November 1993
ENGLISH
ORIGINAL: SPANISH

93-81831 (E)

The meeting was called to order at 10.30 a.m.

AGENDA ITEM 143: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION (A/48/10; A/48/303 and A/48/170*-S/25801*)

1. The CHAIRMAN, initiating consideration of the report of the International Law Commission on the work of its forty-fifth session, said that the Committee especially welcomed its relationship with the Commission, whose exceptional contribution to the codification and progressive development of international law was universally recognized in both governmental and academic circles.

2. Mr. BARBOZA (Chairman, International Law Commission) said that, as indicated in its report (A/48/10), the International Law Commission had held an extremely fruitful forty-fifth session. It had been able to make substantial progress on all the items on its agenda.

3. Introducing the Commission's report, he said that, at the request of the General Assembly in resolution 47/33, the Commission had elaborated a broad, systematic set of draft articles, with commentaries, comprising the draft Statute for an International Criminal Tribunal, for consideration by the General Assembly at its current session. Chapter II of the Commission's report, entitled "Draft Code of Crimes Against the Peace and Security of Mankind", was entirely devoted to the question of the draft Statute and should be read in conjunction with the annex to the report.

4. In discharging its task, the Commission had benefited from the work done at the previous session by the Working Group on a draft statute for an international criminal court. It had also had before it the eleventh report of the Special Rapporteur for the topic, "Draft Code of Crimes Against the Peace and Security of Mankind", which was dealt with in the Commission's report, and also the comments submitted by Governments on the report of the previous year's Working Group, whose proceedings he would discuss in more detail.

5. The draft Statute elaborated by the Working Group was divided into seven main parts: Part 1 dealt with organizational matters; Part 2 with jurisdiction and applicable law; Part 3 with investigation and commencement of prosecution; Parts 4 and 5 with the trial and with appeal and review, respectively; Part 6 with international cooperation and judicial assistance; and Part 7 with the enforcement of sentences.

6. With regard to Part 1 of the draft Statute, he drew particular attention to the bracketed alternatives for article 2, which signalled a divergence of views as to the relationship that should exist between the Tribunal and the United Nations, and to article 5, which laid down the overarching structure of the international judicial system in question. For various reasons, the Working Group had felt that its three organs, namely, the "Court", the "Registry", and the "Procuracy", should be considered as constituting an international judicial system as a whole, notwithstanding the independence that must necessarily exist, for ethical and fair-trial reasons, between the judicial and the prosecutorial organs.

(Mr. Barboza)

7. Part 2, which was the core of the draft Statute, laid down, basically, two strands of jurisdiction, which were rooted in a distinction between treaties that defined specific offences as international crimes and treaties that merely provided for the suppression of undesirable acts categorized as crimes under national law. The crimes falling within the first strand of jurisdiction were listed in article 22. Article 23 dealt with the ways and modalities of acceptance by States of the Court's jurisdiction over the crimes in question and offered three alternatives on which the comments of the Sixth Committee would be particularly welcome. Alternative A could be categorized as an "opting in" system under which participation in the Statute was not sufficient to confer jurisdiction on the Court over certain crimes, but required a special declaration to that effect. That approach emphasized the consensual basis of the Court's jurisdiction and provided the flexibility advocated in the report of the previous year's Working Group.

8. Alternatives B and C embodied an "opting out" approach under which, by becoming a Party to the Tribunal's Statute, a State would automatically confer jurisdiction on the Court over the crimes listed in article 22 while, however, retaining the right to exclude specific crimes from such jurisdiction.

9. Article 24 indicated the States whose consent was required for the Court to have jurisdiction in a given case under article 22. The general rule recommended by the Working Group was that the Court's jurisdiction over a specific crime should be conditional on the acceptance of one, and only one, of the States which would normally have jurisdiction under the relevant treaty. The exception to that general rule was the case where the suspect was present on the territory of the State of his nationality or of the State where the alleged offence had been committed. In such a case, the consent of one or the other of those two States was required in addition to that of the State which, having jurisdiction under the relevant treaty, chose to initiate proceedings before the Court.

10. The purpose of article 25, which did not provide for a separate strand of jurisdiction ratione materiae, was to extend to the Security Council the right to submit cases to the Court.

11. Article 26 enabled specific categories of States to confer jurisdiction on the Court in cases where such jurisdiction would not exist under article 22. A first series of cases encompassed situations that would otherwise fall outside the jurisdiction of the Court, even though they were covered by customary international law. They included, on the one hand, crimes not defined by a treaty, like aggression, or crimes against humanity not covered by the 1949 Geneva Conventions, and on the other hand, cases where the State concerned was not Party to the relevant treaty.

12. A second series of cases envisaged by article 26 encompassed crimes characterized as such by domestic legislation so as to give effect to the provision of a multilateral treaty, such as drug-related crimes. In order to avoid overloading the Court with cases of minor importance, that category, which included crimes "under national law", was restricted to those crimes which, having regard to the relevant treaty, constituted exceptionally serious crimes.

(Mr. Barboza)

13. In the case of crimes under general international law, both the consent of the State on whose territory the suspect was present and that of the State on whose territory the act or omission had occurred were required for the Court to have jurisdiction. In the case of crimes under national law, the consent of the State on whose territory the suspect was present and which had jurisdiction in conformity with the treaty was sufficient.

14. Article 27 provided that individual responsibility for an act of aggression presupposed the commission of the act by the State concerned, and that such a finding of aggression was for the Security Council to make.

15. Part 3 of the draft Statute set out the mechanism for invoking the Tribunal, namely a complaint, and the procedures to be followed in the investigation of a complaint and the commencement of a prosecution. It also defined the general powers of the Procuracy and the Court in discharging their respective responsibilities at the investigation and pre-trial stages of the criminal proceedings.

16. The working group had considered limiting the right to resort to the Tribunal to States Parties to the Statute but had felt that a universal mechanism available to all States would be more consistent with the interests of the international community in prosecuting, punishing and deterring international crimes wherever they occurred. The Working Group had also felt that the Security Council, in the light of its primary responsibility for the maintenance of international peace and security, should be authorized to invoke that judicial mechanism in accordance with the Charter. While recognizing the circumstances which had led the Council to establish an ad hoc tribunal to prosecute persons for crimes committed in the former Yugoslavia, the Working Group had taken the view that it would have been preferable for the Security Council to refer such matters to an existing institution.

17. Under articles 32 and 33, the Court would be required to immediately notify all States Parties to the Statute of the indictment and any related orders and to transmit the indictment and other relevant documents to the State in whose territory the accused was believed to be located. Furthermore, the Court might order a State Party which had accepted its jurisdiction with respect to the crime involved to personally notify the accused of the indictment and to comply with any arrest or detention order. The Court might request a State Party which had not accepted its jurisdiction with respect to the crime concerned to cooperate in notifying, arresting or detaining the accused. If the accused was believed to be in the territory which was not a Party to the Statute, the Court should transmit the indictment and other relevant documents and invite the State to cooperate in notifying, arresting or detaining the accused. The Court might prescribe an alternative method of informing the accused of the charges if personal notification was not achieved within 60 days of the indictment.

18. Article 35 provided that the Court should decide whether the accused should be held or released on bail pending trial.

19. Part 4 of the Statute dealt with the trial proceedings, powers of the Court and the rights of the accused. Article 37 provided that each case should be tried by a Chamber established in accordance with rules of the Court and

consisting of five judges and that judges from either the complainant State or the State of nationality of the accused would be excluded.

20. Articles 36 and 39 of the Statute provided that the Chamber should decide where the trial was to take place and the language or languages to be used during the proceedings. Under article 38, the Court was required to satisfy itself that it had jurisdiction in a particular case under the Statute. Mention should be made of the commentary to that article and the questions put forward by the Working Group in that respect, namely, whether all States Parties had the right to challenge the jurisdiction of the Court or only those with a direct interest in the case, and whether the Statute should provide for the possibility of pre-trial challenges by the accused as to jurisdiction and/or the sufficiency of the indictment. If such was the case, it would have to be agreed whether challenges should be decided by the Bureau or whether a Chamber should be established at the pre-trial stage to decide such matters.

21. In accordance with articles 40 and 46, the Chamber should ensure that the trial was fair and expeditious, that the proceedings were conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

22. Article 51 provided that at the conclusion of the trial, the Court should issue a written judgement. A clearly reasoned statement of its findings should be delivered in open court.

23. Article 52 provided that if the accused was found guilty of the crime, the Chamber should hold a separate sentencing hearing and deliver its decisions on the sentences in open court. Under article 53, the Chamber might impose a term of imprisonment up to and including life imprisonment, order the return of property, the confiscation of proceeds or the payment of a fine. In determining the length of imprisonment or the amount of the fine, the Court should take into account the law of the State of which the perpetrator was a national, the State on whose territory the crime had been committed and the State which had custody of and jurisdiction over the accused. It should also, in accordance with article 54, take into consideration any relevant aggravating or mitigating factors.

24. With respect to Part 5 of the Statute, article 55 set forth the grounds for appeal. The accused might also apply to the Court for revision of the judgement, on the ground that a new fact which could have been a decisive factor in the judgement had been discovered. The competent Chamber for revision would be the chamber which had reached the initial decision, whereas appeals would be heard by an Appeals Chamber consisting of seven judges established by the Bureau. The Working Group planned to return to the question of the extent to which the Prosecutor should be entitled to initiate appellate or review proceedings, which was why the word "prosecutor" appeared in square brackets in articles 55 and 57. In that respect, the guidance of the Sixth Committee would be welcome.

25. The effective functioning of the International Tribunal would largely depend on the international cooperation and judicial assistance of States, and that issue was addressed in Part 6 of the draft. In accordance with article 58,

(Mr. Barboza)

States Parties would be obliged to cooperate with the Tribunal in connection with criminal investigations, and to respond to requests or orders of the Court. Under article 62, the Court might also request the State concerned to take provisional measures when circumstances so required. Article 63 defined the obligations of States Parties to the Statute in relation to the surrender of an accused person. Requests from the Court were to be given priority over extradition requests from States.

26. The final part of the draft Statute, Part 7, dealt with recognition of judgements, enforcement of sentences, pardon, parole and commutation of sentences.

27. In general, the outcome of the past session marked a substantial advance. Although the Commission had not been able to examine the draft articles in detail and to proceed with their adoption, he viewed them as a basis for examination both by the General Assembly at the current session and by individual Governments.

28. Turning to chapter III of the report, "International liability for injurious consequences arising out of acts not prohibited by international law", he said that in his capacity as Special Rapporteur, he had proposed draft articles 11 to 20 bis in his ninth report, which, at the request of the Commission, had been exclusively devoted to the issues relating to the prevention of transboundary harm of activities with a risk of such harm.

29. The report had raised three general issues: the first concerned the determination of the types of activities involving a risk of causing significant transboundary harm; the second related to the character of the obligations which States were expected to assume; and the third concerned the concept of prevention to be used for establishing a preventive regime. Although complex, the first issue was not of insurmountable difficulty. The factors to be taken into consideration in that respect included the type of substances used in the conduct of the activity and the location where the activity was taking place and the technology applied. The idea of having in the draft a list of dangerous activities or at least of harmful substances had not received much support.

30. The second issue related to "due diligence" obligations to prevent transboundary harm. States were expected, on the one hand, to enact legislation and set standards of conduct and, on the other hand, to take appropriate enforcement action in order to compel operators undertaking any activity involving a risk of transboundary harm to abide by those standards.

31. With regard to the third issue, he favoured a broad concept which encompassed both prevention ex ante, i.e., measures taken prior to the occurrence of an accident, and prevention ex post, namely, measures taken after an accident in order to minimize its impact.

32. In essence, draft articles 11 to 20 bis had a threefold purpose: first, to impose on States under whose jurisdiction or control activities involving a risk of harm were carried out an obligation to take precautionary measures; secondly, to enable potentially affected States to be informed of the risk they might be exposed to and to take protective measures; and, thirdly, to promote cooperation

in taking preventive steps. More specifically, article 11 made the carrying out of activities involving risk conditional upon the prior authorization of the State under whose jurisdiction they were to be conducted, a prerequisite for such authorization being, under article 12, the presentation of a transboundary impact statement. Pre-existing activities were similarly subjected to authorization under article 13. Draft article 14 placed on States an obligation to ensure that all necessary measures were taken to minimize the risk and contain or minimize its impact. Draft articles 15, 16 and 18 provided for a system of notification, consultation and exchange of information between the State of origin and the affected State. The legitimate interest of a State in protecting its national security and industrial secrets was taken care of by article 17. Article 19 extended the consultation regime to those cases where a State had reason to believe that an unnotified activity was causing it or created a risk of causing it substantial harm. Article 20 listed a number of factors which States had to take into account during the consultation process and article 20 bis set forth the principle of the non-transference of risk or harm between areas or environmental media.

33. The approach reflected in articles 11 to 20 bis had been well received, although some members had expressed a preference for an approach itemizing categories of activities. The Commission had agreed that the obligation of States was one of due diligence and had found its legal basis in the principle of the sovereign equality of States.

34. Among the various issues discussed by the Commission, he wished to single out four which he believed were of special importance. The first related to the concept of prevention. Some members had opted for confining the concept to prevention ex ante, on the grounds that measures to be taken after the occurrence of an accident were not strictly speaking preventive measures, but rather, were related to liability and compensation. The second issue concerned the situation of developing countries and the difficulties they faced in complying with their obligations because they lacked the necessary financial and technical means. Many members therefore had welcomed his suggestion that the special situation of the developing countries should be dealt with in a specific provision. The third issue stemmed from the fact that in many countries, most of which were developing countries, interference with the activities of private entities might hamper efforts to boost the economy and encourage investment. Care therefore should be taken to keep government interference in the economic activities of the private sector within reasonable limits and to encourage the transfer to the developing countries of the technology and resources they needed in order to comply with their preventive obligations. The fourth issue concerned the balance of interests between the State of origin and the potentially affected State. The Commission had agreed with him that the effective application of the draft articles would require good faith and cooperation between the States concerned. Nevertheless, as many members had stated, the draft should provide for dispute settlement procedures. Some had agreed with him that such procedures should already be available during the consultation stage of an activity, since disputes could arise regarding the assessment of the danger involved.

35. In due course the Commission had referred to the Drafting Committee the draft articles proposed in the ninth report together with a draft article 10 on

(Mr. Barboza)

non-discrimination which he had proposed in an earlier report. The Drafting Committee had provisionally accepted articles 1, 2, 11, 12 and 14, which represented substantial progress. However, the Commission had decided to defer action on those articles pending the adoption by the Drafting Committee of a more comprehensive set of articles. At the same time, it had decided to inform the members of the Sixth Committee of the statement made in plenary by the Chairman of the Drafting Committee. Accordingly, the corresponding extract from the summary record of that meeting was available to delegations in the six official languages. However, since the articles in question had not yet been acted upon or discussed by the Commission in plenary, it would be premature for the members of the Sixth Committee to comment on them.

36. With regard to chapter IV of the report, devoted to "State responsibility", he recalled that, under the plan adopted by the Commission in 1975, the relevant draft was to consist of Part One, concerning the origin of international responsibilities; Part Two, concerning the content, forms and degrees of international responsibility, and a possible Part Three, on the question of the settlement of disputes and the implementation of international responsibility. Part One had been adopted on first reading in 1980. The Commission currently was dealing with Part Two, which would consist of four chapters. Chapter I had been adopted on first reading in 1986. Chapter II would deal with the legal consequences of an international delict, chapter III would address the consequences deriving from international crimes and chapter IV would contain the final provisions.

37. The Commission had made substantial progress on the topic at its last session. In addition to a new paragraph 2 to be included in article 1 of Part Two of the draft articles, the Commission had considered and provisionally adopted article 6 (Cessation of wrongful conduct), article 6 bis (Reparation), article 7 (Restitution in kind), article 8 (Compensation), article 10 (Satisfaction) and article 10 bis (Assurances and guarantees of non-repetition). Article 6 was of considerable relevance within an international legal system which unfortunately was still imperfect and was a remedy frequently resorted to by organs of international organizations, in particular, the General Assembly and the Security Council of the United Nations. Article 6 bis was an umbrella article which, in addition to establishing the right of a State injured by an internationally wrongful act to obtain full reparation for the injury sustained, identified the various methods available to the wrongdoing State to discharge its corresponding obligation. The article also stated the general principle that the wrongdoing State could not invoke its internal law as justification for failure to provide full reparation for the injury. Articles 7, 8 and 10 dealt with the forms of reparation, namely, restitution in kind, compensation and satisfaction. The assurances and guarantees of non-repetition dealt with in article 10 bis were not, strictly speaking, a form of reparation, although they resembled satisfaction.

38. The Commission had also received from the Drafting Committee draft articles on countermeasures, which were to appear in chapter II of Part Two. They were article 11 (Countermeasures by an injured State), article 12 (Conditions relating to resort to countermeasures), article 13 (Proportionality) and article 14 (Prohibited countermeasures). As indicated in paragraph 204 of the report, the Commission, in line with its policy of not adopting articles not

accompanied by commentaries, had agreed to defer action on the texts to its next session. At the same time, it had decided to apply the same arrangements described in relation to the topic of international liability and, accordingly, the extract from the relevant summary record was available to delegations in the six official languages. He again stressed that the articles had not been acted upon or discussed by the Commission in plenary and that it therefore would be premature for delegations to comment on them.

39. As appeared from section B.3 of chapter IV of the report, the prospective Part Three of the draft articles on State responsibility, on dispute settlement, had received considerable attention in plenary. The discussion had proceeded on the basis of the proposals of the Special Rapporteur, reproduced in footnotes 74 to 79 of the report. According to the Special Rapporteur, the Commission should abandon what he called its cautious policies regarding dispute settlement provisions and adopt a suitably effective settlement system, for two reasons. First, to correct as well as regulate the rudimentary system of unilateral reactions known as countermeasures, and second, to bridge the legal gap resulting from the absence of real procedural obligations for States in that matter.

40. In its future handling of the issue, the Commission would be guided by the views of delegations, which were of decisive importance at the current stage. In the discussion, three main arguments had been advanced in favour of the inclusion of a dispute settlement regime that would provide for compulsory third-party settlement procedures. The first concerned the evolution of the international climate and the increased willingness of States to accept not only compulsory procedures but also judicial procedures, as was shown by the increasingly heavier case-load of the International Court of Justice. The point was made, however, that, despite those circumstances, it was still premature to embark on compulsory dispute settlement procedures.

41. The second argument related to the role of the International Law Commission. Some members had urged the Commission to exercise its responsibility with regard to the progressive development of the law and to chart a course guided by the principles of justice and sovereign equality. Other members had remarked that, while, at the internal level, the judge was accepted as the guarantor of the legal order and the authoritative interpreter of the law, in international society, each sovereign State assessed the legality of its own conduct and that of its partners. In their opinion, any drastic curtailment of the prerogatives of States stood little chance of being accepted and a modest approach was therefore more advisable.

42. The third argument related to the need to protect weak States from abuses, on the part of powerful States, of the right to resort to unilateral measures. In the view of those members, it was imperative that the draft articles should not only provide for substantive rules but also establish effective, prompt and binding procedures for compulsory third-party dispute settlement, particularly in the light of the risk of escalation inherent in the very idea of countermeasures. However, other members, while recognizing that there must be a strong check on excessive countermeasures, had taken the view that compulsory dispute settlement procedures were not a viable means to that end, because

(Mr. Barboza)

States were unlikely to have resort to such procedures in areas where countermeasures most needed to be checked.

43. Regarding the scope of the dispute settlement regime, the question had been asked whether the Commission should design a dispute settlement system to deal with any question that arose about the interpretation or application of the entire set of draft articles on State responsibility. The response had generally been affirmative; some members had stressed that the area of countermeasures should receive special and priority attention because a countermeasure was an exceptional derogation from international law. At the same time, doubts had been expressed about the possibility of devising a single regime for all types of disputes.

44. Various ways of delimiting the scope of the dispute settlement regime to be provided for in the future convention had been mentioned. One approach consisted in restricting it to disputes concerning the interpretation or application of the future instrument on the basis of the usual model of treaty provisions on dispute settlement. Doubts had been expressed on the desirability of adopting such a solution, inasmuch as all questions covered by the draft articles were closely linked to primary rules. Another approach was to envisage separate regimes for evaluating the lawfulness of countermeasures and the settlement of disputes relating to the interpretation or application of the future convention. That approach was viewed as having a twofold advantage: first, it would allow an impartial decision to be taken rapidly on the admissibility of countermeasures, something which would be in the interest of the wrong-doing State, which might be affected by unjustified countermeasures, and of the injured State, which would thus be assured of not subsequently being penalized for having acted ultra vires; secondly, recourse to settlement procedures in the event of disputes relating to the application or interpretation of the future convention would be available even in the absence of countermeasures. Another suggestion was to distinguish between disputes concerning the lawfulness of countermeasures, disputes related to crimes, and other disputes. The views of the members of the Sixth Committee would be extremely useful to the Commission when it took up the matter.

45. In another connection, the Commission needed the guidance of the Sixth Committee on the question of the consequences of international "crimes" of States within the meaning of article 19 of Part One of the draft. He noted that the Commission had had before it in that respect the second part of the fifth report of the Special Rapporteur but had been unable to consider it for lack of time. As was known, article 19, adopted on first reading, provided that an internationally wrongful act which resulted from the breach by a State of an international obligation so essential for the protection of the fundamental interests of the international community that its breach was recognized as a crime by that community as a whole constituted an international crime. The issue currently confronting the Commission was to determine the consequences of the so-called "crimes" and, more specifically, as the Special Rapporteur had indicated, to assess on the one hand whether the gravity of the breaches of international law seriously prejudiced an interest common to all States, thus aggravating the content of the consequences, both substantive and instrumental, that characterized an ordinary erga omnes breach, and if so, to what extent; and

on the other hand, whether the fundamental importance of the rule breached gave rise or not to changes in the multilateral relations that normally arose in the presence of an ordinary breach of an erga omnes obligation under general law.

46. On the first question, the Special Rapporteur had successively addressed the substantive consequences of international crimes, namely reparation, and their instrumental consequences, countermeasures. In regard to reparation, three possible derogations had been envisaged, (1) the limitation to restitutio based on excessive onerousness, as provided for in article 7 (c); (2) the prohibition, laid down in article 10, of punitive damages, humiliating demands or demands affecting matters generally considered to pertain to the freedom of States; and (3) demands for satisfaction or guarantees against repetition strongly affecting the area of the domestic jurisdiction of the wrong-doing State, as envisaged in article 10 bis.

47. As to the instrumental consequences of crimes (the so-called countermeasures), the Special Rapporteur had distinguished between, on the one hand, countermeasures short of the use of force and, on the other, countermeasures involving the use of force either in self-defence or in such situations as armed support to peoples under alien domination or oppressive regimes and armed intervention against a State responsible for large-scale violations of human rights. In that context, he had asked whether armed countermeasures in response to a crime were admissible when they were intended to obtain reparation or adequate guarantees of non-repetition. He had also asked whether the admissibility of reactions to crimes varied depending on whether they were taken by one or more injured States uti singuli or by the community of States uti universi, and whether the competence to adopt sanctions against particularly serious crimes should be restricted de lege lata and/or de lege ferenda to the so-called organized international community, as represented by the United Nations and, in particular, the Security Council as the organ endowed with the greatest powers of action. In that context, he had raised three specific questions: first, de lege lata, whether the existing powers of United nations organs included the determination of the existence, the attribution and the consequences of the wrongful acts contemplated in article 19; second, de lege ferenda, whether and in what sense the existing powers of those organs should be legally adapted to those specific tasks; and, third, to what extent the powers of United Nations organs would affect the facultés, the rights or the obligations of States to react to the internationally wrongful acts in question, either in the sense of substituting for individual reactions or in the sense of legitimizing, coordinating, imposing or otherwise conditioning such individual reactions. Those three issues were at the very apex of the international legal system, and any views which members of the Committee might wish to express on them in the light of the Special Rapporteur's comments, as reflected in paragraphs 300 to 310 of the report, would provide extremely valuable guidance to both him and the Commission.

48. As for measures short of force in reaction to a crime, in the opinion of the Special Rapporteur, they could conceivably be exempted to a greater or lesser degree from the conditions and prohibitions to which resort to countermeasures was subject. Thus, it was possible to contemplate setting aside the limitations on extreme measures of an economic or political nature, measures affecting the independence, sovereignty or domestic jurisdiction of the

(Mr. Barboza)

wrongdoers and measures affecting third States. As to the subjective element, the Special Rapporteur has asked whether the possible attenuations of such limitations should benefit all the States injured, or the principal victim of the crime, or the organized international community.

49. Against that background, the Special Rapporteur had briefly touched on the pros and cons of the aforementioned article 19. While observing that the extreme complexity of the issues involved might be viewed as a good reason not to give effect to article 19 in Parts Two and Three, he had found it difficult to subscribe unconditionally either to the notion that criminal responsibility would be incompatible with the nature of the State under existing international law or to the view that the responsibility of States should be restricted to the area of reparation, a view which, in the opinion of the Special Rapporteur, ran counter to practice.

50. Referring to chapter V of the report, which dealt with the law of the non-navigational uses of international watercourses, he said that, at its latest session, the Commission had begun the second reading of the draft articles adopted on first reading in 1991.

51. In his first report, the Special Rapporteur had reviewed the first 10 articles in the light of the comments and observations which had been received from Governments and taking into account the latest developments in similar fields. He had concluded, and the Commission had fully agreed, that no major redrafting was necessary and that the main purpose of the second reading should be "fine-tuning". He had, however, raised several important issues. The first, referred to in paragraphs 344 to 350 of the Commission's report, was whether the draft articles should form the basis of a "framework convention" or of "model rules". Most members of the Commission had expressed a preference for former approach, which had underlain all the work carried out to date, had been broadly endorsed in the Sixth Committee and was generally favoured in the written comments of Governments.

52. The second issue, which was dealt with in paragraphs 351 to 356 of the report, was whether dispute settlement provisions should be included in the draft articles. Many members had agreed with the Special Rapporteur that the value of the draft would be greatly enhanced if the Commission were to supplement it with a set of provisions on fact-finding and dispute settlement, tailored to the particular nature of the questions involved.

53. The third issue raised by the Special Rapporteur concerned the possible inclusion of "confined international groundwaters" within the scope of the draft articles (paras. 362 and 367 to 370 of the Commission's report). As indicated in paragraphs 440 and 441, on the recommendation of the Planning Group, the Commission had requested the Special Rapporteur to prepare a feasibility study on the matter and to submit a report to it at its next session.

54. A fourth issue concerned the limit on the tolerable adverse effects of a use of an international watercourse. The Special Rapporteur had suggested that the word "appreciable" should be replaced by the word "significant" in the English text; in his view, the term "appreciable" was inadequate because it could be interpreted as "capable of being detected or measured". Opinions were

divided on that proposal, as was apparent from the summary of the discussion contained in paragraphs 374 and 377 to 385 of the Commission's report.

55. Other points had been raised in connection with specific articles. In article 2, for example, the Special Rapporteur had suggested deleting the reference in paragraph (b) to "flowing into a common terminus". With respect to article 3, on watercourse agreements, he had suggested reformulating paragraph 3 to accommodate the concern expressed by some Governments regarding the relationship between the draft articles and existing agreements.

56. The question of the relationship between article 5, which laid down the principle of equitable and reasonable utilization and participation, and article 7, which provided for an obligation not to cause appreciable harm, was problematic in the view of some Governments. The Commission had discussed it extensively and hoped that the Committee would give that issue the attention it deserved.

57. At the conclusion of its consideration of the Special Rapporteur's first report, the Commission had referred articles 1 to 10 to the Drafting Committee, which had been able to adopt articles 1 to 6 and 8 to 10 on second reading. There again, however, the Commission had deferred action on those articles until its next session, pending the submission of updated and revised commentaries and the preparation by the Special Rapporteur of the feasibility study on confined international groundwaters. In accordance with the Commission's request, the relevant introductory statement of the Chairman of the Drafting Committee was available to the members of the Sixth Committee. However, he once again urged delegations to refrain from commenting on the articles since they had not yet been acted on or discussed by the Commission.

58. Referring to chapter VI of the report, entitled "Other decisions and recommendations of the Commission", he said that the Commission had decided that it would endeavour to complete, by 1994, the draft of a statute of an international criminal court and the second reading of the draft articles on the law of the non-navigational uses of international watercourses, and, by 1996, the second reading of the draft articles on the Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility. It had also decided that it would endeavour to make substantial progress on the topic of international liability for injurious consequences arising out of acts not prohibited by international law and, subject to the approval of the General Assembly, would undertake work on one or more new topics.

59. The efforts made in recent years, particularly at the latest session, to identify topics suitable for study by the Commission had had a positive outcome; as indicated in paragraph 440 of the report, the Commission had decided that, subject to the approval of the General Assembly, two new topics would be included in its agenda, namely, "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons". The Commission was of the view that both topics responded to a need of the international community, that the international climate was propitious for their consideration and that work in those two areas stood a good chance of producing concrete results within a reasonable period.

(Mr. Barboza)

60. With regard to the Commission's contribution to the United Nations Decade of International Law, arrangements were being made for the circulation of a publication containing a number of studies to be prepared by members of the Commission.

61. The Commission had maintained its cooperation with other legal bodies, including the Asian-African Legal Consultative Committee, the European Committee on Legal Cooperation and the Inter-American Juridical Committee. It attached great importance to such cooperation, which enabled it to keep abreast of legal developments at the regional level.

62. Chapter VI, section E, was devoted to the twenty-ninth session of the International Law Seminar, which was funded by voluntary contributions from Member States and through national fellowships awarded by Governments to their own nationals. The Commission had noted with particular appreciation that the Governments of Austria, Cyprus, Denmark, Germany, Ireland, Mexico, Norway, Sweden, Switzerland and the United Kingdom had made fellowships available, in particular to participants from developing countries, through voluntary contributions to the appropriate United Nations programme. Thanks to those contributions, it had been possible to achieve adequate geographical distribution of participants. The Commission had stressed once again the importance it attached to the Seminar, which enabled young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which had their headquarters in Geneva. As all the available funds were almost exhausted, the Commission recommended that the General Assembly should again appeal to States which could do so to make the voluntary contributions that were needed for the holding of the Seminar in 1994 with as broad a participation as possible.

63. On behalf of the Commission, he thanked the Government of Brazil for having made possible the holding in 1993 of the twelfth Gilberto Amado Memorial Lecture. The lecture had been delivered by Professor Caflisch, The Legal Counsel of the Swiss Federal Department of Foreign Affairs, who had spoken on "Peaceful Settlement of International Disputes - New Tendencies".

64. Mr. KOROMA (Sierra Leone) said that the topics considered by the International Law Commission reflected contemporary reality and underscored the continuing role played by international law in the achievement of the objectives of the Charter of the United Nations. The treatment of those topics justified the confidence placed in the International Law Commission as the main legislative body of the United Nations in the field of international law and underscored the symbiotic relationship between the International Law Commission and the Sixth Committee in ensuring that the will of the international community was reflected in legal instruments.

65. With regard to the Draft Code of Crimes against the Peace and Security of Mankind and, specifically, the draft Statute for an international criminal court, the International Law Commission had undertaken the preparation of the draft Statute as a matter of priority, and the Sixth Committee should carry out a detailed study to determine whether it was feasible, in the light of the guidance and comments provided by delegations.

(Mr. Koroma, Sierra Leone)

66. With regard to the relationship between the proposed Court and the United Nations, his delegation was of the view that it would be judicious for the Court to become an organ of the United Nations, in order to encourage all States to become Parties to the Statute and achieve the goal of universality. However, whether the Court became an organ of the United Nations or a specialized agency was not too important given that the Commission had established that an international criminal court was functionally feasible.

67. With regard to the criminal judicial system, while he understood the reason given for the relatively long tenure of judges, he believed that the period specified in the draft should be reduced by one third; that would not only ensure prohibition against re-election, but also guard against encumbering the Court with judges who might no longer be in a position to discharge their functions effectively. It should be specified in article 9 that judges should be not only independent but impartial. Moreover, they should be deprived of their office not only in the case of proven misconduct but in the case of proven and serious breach of the Statute of the Court.

68. Sierra Leone agreed that the prosecutor should be elected by the States Parties to the Statute of the Court and that he should be independent and impartial in performing his duties. However, given the types of offences with which the Court would be dealing, the prosecutor should not be given the final decision in initiating prosecution. His delegation therefore welcomed the safeguard provided for reviewing the prosecutor's decisions in certain cases for reasons of public interest. On the issue of what law the Court should apply, the draft distinguished between treaties which defined crimes and those which provided for the suppression of undesirable conduct constituting crimes under national law, specifically treaties dealing with the combating of drug-related crimes. In his delegation's view, the criteria used to differentiate between those two categories were not unassailable, and the matter should be reconsidered by the Commission both on purely legal grounds and for reasons which were of interest to a number of States, particularly small States.

69. An international criminal jurisdiction, if it were established, would be different from the International Court of Justice, ratione personae and ratione materiae. It should obviously not be for those who had allegedly committed an international crime to determine how they should face the law; the ideal situation therefore would be a system whereby a State, by becoming a Party to the Court's Statute, would automatically confer jurisdiction on the Court over the crimes that had been agreed on. However, since a decision had been taken by consensus that jurisdiction over crimes should not be conferred automatically, but that a special declaration would be necessary for that purpose, his delegation would accept that decision.

70. His delegation also approved the recommendation which would grant the Security Council the right to bring before the Court the crimes referred to in articles 22 and 26 (2) of the draft Statute but it believed that it would be appropriate to confer a similar right on the General Assembly, in view of the representative nature of that organ, and given the type of offences to be tried by the Court, such as genocide. It also welcomed the provisions relating to crimes under customary law, in order to ensure that those who might have committed serious crimes such as aggression or genocide but were not Parties to

(Mr. Koroma, Sierra Leone)

the Convention on the Prevention and Punishment of the Crime of Genocide or the 1949 Geneva Conventions were not beyond the reach of the law. His delegation had also called for a review of article 26 (2) (b) relating to the distinction between treaties which defined crimes as international crimes and treaties which laid down provisions for the suppression of undesirable conduct constituting crimes under national law, such as the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and believed that it should be brought into line with the other provisions of the draft Statute. As that paragraph was currently formulated, the Court would have the competence to deal with drug-related crimes if the multilateral treaty had become part of the national law or if the treaty itself was based on the principle aut dedere aut judicare. The Commission should look into that matter once more.

71. Part 3, "Investigation and Commencement of Prosecution" set forth the mechanism for invoking the tribunal, namely a complaint, the procedure to be followed in the investigation of a complaint, and the commencement of prosecution. His delegation agreed that that mechanism should be universal and not limited to Parties to the Statute, in that it was more consistent with the interests of the international community to ensure that crimes did not go unprosecuted for want of jurisdiction. It welcomed the recommendation that the prosecutor should ensure that the rights of the accused were respected in the course of an investigation and those regarding similar safeguards such as the observance of the principle of nullem crimen sine lege and non bis in idem during the trial. He agreed that the trial should be conducted before a chamber of five judges in which neither the complainant State nor the State of which the accused was a national would be represented.

72. With regard to the question of trials in absentia, if the prosecutor claimed to have sufficient evidence to prefer an indictment, the trial should take place even if the accused refused to make himself available for the trial; nevertheless, if the charges were proved and a conviction entered, a new trial should be conducted at such time as the accused re-emerged or decided to make himself available for trial, so as to ensure that he had an opportunity to challenge the verdict. Both the prosecutor and the accused - the former under very limited circumstances, as in the case of a material error of law, or the emergence of a new fact not known at the time of the trial, the latter under much broader circumstances - should be permitted to appeal against a decision.

73. The return of property or proceeds acquired in the commission of a crime, the confiscation of such property or proceeds, or payment of a fine to the State where the crime was committed or whose nationals were the victims of the crime, or to a trust fund to be established by the United Nations for the benefit of victims, were innovative and practical solutions. Article 58, on international cooperation and judicial assistance, was also very pertinent, in that the effective functioning of the international tribunal would be dependent on such cooperation and assistance, particularly as spelled out in paragraph 2. With regard to the surrender of an accused person to the tribunal, the provisions of article 63 were crucial as a deterrent to the commission of crimes subject to the jurisdiction of the tribunal. Sierra Leone supported the proposal that a request for surrender from the Court should be given priority over an extradition request.

(Mr. Koroma, Sierra Leone)

74. Lastly, with regard to recognition of judgements and enforcement of sentences imposed by the Court, his delegation agreed that sentences should be served in a State designated by the Court, or in the absence of such designation, in the State where the tribunal had its seat. Nevertheless, acceptance by the administering State of responsibility for implementing the decision should extinguish the competence of the sentencing court to enforce it. In any event, the enforcement of a sentence should be subject to the supervision of the Court.

75. Mr. CALERO RODRIGUES (Brazil) said that the International Law Commission had previously proposed a model for an international criminal court and had asked the General Assembly to decide whether, and on what basis, the project should be undertaken. A more detailed, and technically superb draft Statute had been presented in the current year; his delegation was nevertheless uncertain whether that draft would lead to the establishment of a tribunal that would satisfy the need of the international community for international criminal jurisdiction, owing to a number of significant problems, the most important being the question of the law to be applied and the conferment of jurisdiction.

76. It was a truism that the main function of a court was to apply legal norms. The problem arose when the norms to be applied did not exist or existed only in an imperfect form. It could be said that international crimes had been defined by international treaties or by international law, but the definitions and penalties provided by those sources were not, as a general rule, sufficiently precise to allow a court to abide by the principle of nullum crimen, nulla poena, sine lege.

77. With respect to the law to be applied, Part 2 of the draft Statute established two strands of jurisdiction. On the one hand, article 22 set out the crimes which were defined by specific international treaties; on the other, article 26 drew a distinction between "a crime under general international law," and "crimes under national law ... which give effect to provisions of a multilateral treaty." The first presented a selected list of existing international instruments, but none of those instruments with the exception of the Convention on the Prevention and Punishment of the Crime of Genocide, envisaged the possibility that an international court might try the crimes defined in that instrument.

78. The second strand of jurisdiction posed still more questions; firstly, article 26, paragraph 2 (a), referred to "a crime under general international law," that was to say, under a law the violation of which gave rise to the criminal responsibility of individuals. The Commission explained that that paragraph was intended to cover international crimes which had their basis in customary international law and which otherwise would fall outside the Court's jurisdiction, and cited, by way of example, aggression, genocide and crimes against humanity. In the view of Brazil, it was not necessary to refer to the notion of crimes having their basis in customary international law in order to settle a problem of jurisdiction. Secondly, paragraph 2 (b) referred to "crimes under national law ... which give effect to provisions of a multilateral treaty," and which "constitute exceptionally serious crimes." That definition meant that, first, there must be an international treaty which defined what was meant by an exceptionally serious crime; secondly, a State must have

(Mr. Calero Rodrigues, Brazil)

incorporated that crime into its domestic legislation in order to give effect to the treaty; and thirdly the definition in the domestic legislation must be brought back into international law so that the crime could be tried and punished. The reason for shifting back and forth between the two types of legislation became clear when the report of the International Law Commission referred to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; it had been deemed impossible to incorporate the crimes defined in that Convention directly into the list in article 22, because the instrument had not yet entered into force. In addition to that technically correct reason, it was possible that the Commission had taken into account the argument that drug-related crimes were not sufficiently defined in the Convention for it to be regarded as treaty law under the jurisdiction of the Court.

79. The problems posed by the provisions of the draft Statute with relation to the definition of crimes that should fall within the jurisdiction of the Court arose from the insufficient attention paid to the fundamental distinction between judiciary law and substantive law. Well-defined substantive provisions were the indispensable basis for the functioning of the Court, the definitions of international crimes currently in existence were insufficient. The obvious solution would be to first establish the substantive laws and then move on to the corresponding judiciary laws. The current situation had been caused, in part, by the General Assembly, which, in its wish to respond quickly to urgent requests for the establishment of an international jurisdiction, had overlooked the fact that no such substantive law existed.

80. His delegation questioned whether the draft Statute proposed by the International Law Commission could be approved before its core problems were resolved. Nevertheless, the Commission had been working for some time on the needed substantive law, namely, the Code of Crimes against the Peace and Security of Mankind. While he agreed that the text adopted by the Commission on first reading was far from satisfactory, the code would provide the necessary basis for the establishment of the Court.

81. With regard to the limitations imposed by the draft Statute on the Court's jurisdiction, he pointed out that, in order for the jurisdiction to really exist, certain States had to agree thereto. It was those States which, in fact, conferred jurisdiction on the Court through a complex but not illogical system provided for in the draft Statute, based on the notion that the Court was not to be endowed with an inherent jurisdiction arising out of the instrument which created it. The Court would be nothing more than a "facility" to which States could transfer the jurisdiction which they had over certain crimes.

82. In his view it seemed obvious that the system, and the premise on which it was based, would deprive the Court of the possibility of becoming a meaningful institution. If the intention was to move forward in the development of criminal international law, then it seemed clear that a court which, on the central question of jurisdiction was so dependent on the will of a particular State, was not what was needed. States were currently free to decide whether or not to establish an international criminal court. If they decided to create a court, they should give it the powers and the means to play a significant role in international life. Otherwise there would be no point in creating it.

(Mr. Calero Rodrigues, Brazil)

83. Over the years, his delegation had expressed its doubts and reservations both on the draft Code of Crimes against the Peace and Security of Mankind and on the establishment of an international criminal court. At the present time it was not expressing a blind and enthusiastic support for them; it was being attentive to the wishes of the international community. He was not entirely convinced that the political will for the establishment of the Court, which currently seemed to exist, would be maintained in the long run. In his view, the international community would be wise to maintain its resolve to work steadily for the development of norms and institutions that could contribute to a better and saner world.

84. Mr. YAMADA (Japan) said that, as circumstances evolved, the international community felt the need for a new mechanism to ensure the rule of law. In that connection, the Security Council had recently established an International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia, and a number of forums in the United Nations were elaborating international legal instruments in various fields.

85. Under those circumstances, the Commission's task was becoming more demanding and the time available to it to complete that task more restricted, since, in the absence of general rules which could be applied to a given situation, the international community tended to resort to ad hoc or unilateral measures, or to be satisfied with an instrument covering the specific area or situation.

86. In order for the Commission to play an active role in the development of international law, it must be sensitive to the needs of the international community and study ways in which those needs could be best fulfilled within a reasonable period of time. In that connection, it was important for the Commission to maintain close contact with the Sixth Committee in order to identify the actual needs and to get guidance on its work directly from the international community. In his view, the degree to which the Commission succeeded in that difficult task would determine its raison d'être in the future.

87. From that point of view, the working method adopted for the drafting of the Statute of an international criminal court, through the establishment of a Working Group which had been divided into three subgroups, was effective, since it provided the Committee with draft articles on which it could deliberate. He hoped that the Commission would consider the possibility of using the same method for other topics, with due regard for the role of the Drafting Committee.

88. His delegation hoped that the General Assembly would endorse the two items selected by the Commission as its new long-term programme, namely, "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons", and that, as on previous occasions, it would give the Commission clear guidance on the priority of the items included in its programme of work.

89. Commenting on Chapter II of the Commission's report entitled "Draft Code of Crimes against the Peace and Security of Mankind" and on the report of the

(Mr. Yamada, Japan)

Working Group on a draft Statute for an international criminal court, he expressed his overall support for the report, which was based on a realistic and flexible approach to the question. The approach of optional acceptance by States of the Court's jurisdiction would facilitate the acceptance of the Statute by a larger number of States, which was the main and most important condition to be satisfied.

90. On the other hand, further study was needed to make the Statute consistent with the basic principles of criminal law, including the principle of nullum crimen sine lege and the protection of the rights of the accused. At the same time, it was necessary to ensure that the Court functioned effectively. In that connection, although it would be desirable for the tribunal to be established as a judicial organ of the United Nations, as proposed in article 2, in order to secure the full support of the international community, it seemed more practical, for the time being, for it to be established as an organ formally linked to the United Nations by a treaty of cooperation.

91. As for Part 2 of the draft Statute, further consideration and adjustment were required in respect of articles 22 to 26. A clear distinction should be made between the provisions concerning the jurisdiction of the Court, those concerning the modalities of its acceptance, and those concerning the conditions for bringing complaints before the Court. Article 24, which defined the scope of the Court's jurisdiction, should be placed at the beginning of Part 2 and should cover all the crimes referred to in the Statute. It could simply state that the Court would have jurisdiction over such crimes when such jurisdiction was conferred on the Court by any State which had jurisdiction to try the perpetrator of the crime before its own courts. The issue of acceptance of the jurisdiction of the Court by the State of the perpetrator's nationality or by the State where the alleged offence was committed, which was currently dealt with in article 24, paragraph 2, should be moved to another article, perhaps article 29, which stated the conditions that must be fulfilled in order to bring a case before the Court in the form of a complaint. After defining the scope of the Court's jurisdiction, the Statute should define concrete procedures to be followed for States to accept such jurisdiction. In that regard, Japan supported the modality of acceptance described in article 23, Alternatives A or C.

92. There were three categories of crimes within the scope of the Statute. The first category was that of international crimes defined as such by treaties, the suppression of which was in the interest of the international community as a whole. The second was that of drug-related crimes or other serious crimes under national law, in respect of which some States might desire that the Court cede its jurisdiction to them. The same was true of crimes under international law, which comprised the third category. In that connection, the Commission should further elaborate the definition of crimes belonging to the latter two categories outlined in article 26, paragraph 2. In any case, the system for invoking the Court's jurisdiction would become clear if article 29 were complemented by provisions outlining the conditions that must be fulfilled, with respect to each category of crime, in order for a case to be brought before the Court. In that connection, he shared the view of the Working Group that the conditions in respect of the second and third categories of crimes should be more strict.

(Mr. Yamada, Japan)

93. As for the law to be applied, it should be recognized that international law was frequently silent on matters such as penalties, defences, and extenuating circumstances, and that even the definition of crimes under treaties was not always sufficiently clear. It would be necessary, therefore, to refer to domestic law and State practice for such purpose or to provide for appropriate provisions in the Statute, especially with a view to ensuring that the international criminal tribunal conformed to the principle of nullum crimen sine lege.

94. Mr. FLATLA (Norway), speaking on behalf of the Nordic countries, said that the draft Statute for an international criminal tribunal which was before the Sixth Committee meant that the Committee had moved from the realm of academic debate to result-oriented drafting. The international community should proceed towards the early establishment of the tribunal, which should prove an important deterrent since the perpetrators of international crimes would sooner or later be brought to account for their acts.

95. The Nordic countries supported the basic outline of the tribunal proposed by the Working Group of the Commission. They were of the view that the structure and language of the draft dealt cogently with relevant issues; they would present a more detailed analysis at a later stage in the written comments by Governments. However, without entering into a technical discussion, they wished to point out certain issues of principle which could provide guidance to the Commission in its future work.

96. Firstly, the issue of the relationship of the tribunal to the United Nations had not been resolved. The Nordic countries were of the opinion that neither of the two alternatives in draft article 2 had any bearing on the tribunal's independence, which should be clear, in view of the provisions in the draft about the independence of the judges and the procuracy as well as the precedent constituted by the International Court of Justice. In that regard, the Nordic countries preferred that the tribunal should be a judicial organ of the United Nations, and that there should be no doubt as to the functions of the tribunal under the mandate of the Organization, irrespective of the technical solution eventually chosen. That would have implications for the permanence and legitimacy of the tribunal, particularly in cases in which the State of which the perpetrator was a national did not accept the tribunal's jurisdiction.

97. Turning to the subject of jurisdiction, he said that the Nordic countries were gratified to see the enumeration of serious crimes contained in article 22. They had consistently supported the view that the jurisdiction of the tribunal should be limited to serious crimes against mankind. Giving priority to Treaty rules which had evolved into international customary law would provide predictability in assessing individual responsibility for serious crimes, by eliminating the ambiguity that might arise from the different definitions of crimes in national legal systems. The Nordic countries took note of the fact that the Security Council had applied the same line of thought when it established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, in its resolution 827 (1993). However, they had some hesitations about the rather complicated system of strands of jurisdiction and different categories of crimes as set out

(Mr. Flatla, Norway)

in articles 23 to 26. Such a system might lead to procedural difficulties and, moreover, not all the crimes referred to had the degree of seriousness which should be mandatory for engaging the Court in action. Furthermore, certain rules in the draft Statute should be more specific in order to safeguard, as at the national level, the rights of those accused.

98. Under the various versions of article 23, State consent remained the basis for the Court's jurisdiction. While it was understandable that the Commission had not wished to encroach on the primacy of State sovereignty, the Statute should avoid facilitating "jurisdiction-shopping" by States. The Nordic countries preferred alternative B, which provided for the presumption of jurisdiction of the tribunal in respect of all Parties to the Statute with regard to those treaties to which they were Parties, with the possibility of an "opting-out" declaration by a Party that wished to exclude the tribunal's jurisdiction in some respects. The other alternative might lead to the tribunal ending up with a very narrow scope of jurisdiction based on the individual declarations of each Party, thereby weakening the general aim of providing for real individual responsibility for serious crimes against mankind.

99. It was necessary to ensure that reliance on State consent during the various stages of the procedure did not create an obstacle to bringing to justice those persons who had committed crimes. The projected role of the Security Council under articles 25 and 27 provided in that respect an interesting proposal whose modalities could be further elaborated in the future.

100. Article 24 also required that the State in which the accused found himself accepted the tribunal's jurisdiction. In that respect, the jurisdiction of the International Tribunal for the former Yugoslavia seemed to have been more adequately defined.

101. Although there was a clear distinction between the procedures used for the establishment of the International Tribunal for the former Yugoslavia and the international criminal tribunal, there were nevertheless some similarities. Furthermore, the Nordic countries supported the role that might be played by the Security Council in accordance with articles 25 and 27. With the proviso that the Council would not normally refer to the Court complaints against specific individuals, it was entirely appropriate that the Council should have the prerogative of referring particular matters to the Court and leaving it to the latter to decide whether prosecution should be instituted. Depending on the outcome of the drafting of the rules on jurisdiction, the Security Council might well play a central role in identifying situations that might entail legal action by the Court.

102. The Nordic countries had some hesitations with regard to the provision for trial in absentia in article 44, since such trials would give rise to political as well as legal difficulties which should be avoided. The draft should also include more specific evidentiary rules and should elaborate principles concerning intent, self-defence and orders from a superior. On the other hand, the institution of bail was not compatible with many important legal systems, including the Nordic legal tradition, and should therefore not be applied.

(Mr. Flatla, Norway)

103. The Nordic countries believed that the Commission should consider incorporating in the Statute of the Court certain fundamental principles safeguarding the rights of victims. General Assembly resolution 40/34 entitled "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", embraced certain guiding principles in that area. The examples stated therein provided for fair treatment and appropriate assistance, which were issues that should be examined in order to ensure acceptable treatment of victims of atrocities.

104. The Nordic countries were pleased to see that the provisions regarding penalties in article 53 did not include the death penalty, which was in harmony with their views. The reference to relevant national laws was also useful.

105. The Nordic countries wished to see the final draft Statute submitted for adoption by the General Assembly at its forty-ninth session. If the political will was present, it would be possible to complete the draft within the next year, since the Commission had produced a solid legal foundation for the Committee's deliberations.

The meeting rose at 1.10 p.m.